86-691

Supreme Court, U.S.
FILED
OCT 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. _____

TOBIN LANDSCAPE AND CONSTRUCTION COMPANY, INC.,

Appellant,

v.

JAMES BRAMLETT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

JURISDICTIONAL STATEMENT

LAW OFFICES OF JOE B. ABBEY
3110 Olympia and York Tower
1999 Bryan Street
Dallas, Texas 75201
(214) 922-9245

By: _____
Joe B. Abbey
Bar No. 00789000
Counsel for Appellant

October 3, 1986

49pp

QUESTION PRESENTED

Whether Tex. Rev. Civ. Stat. Ann. article 5069 — 1.06 is violative of the Due Process Clause of the Fifth Amendment of the Constitution of the United States and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States when applied to impose an excessive penalty for an alleged charge of interest made within the first thirty days after the accrual of a debt, where said charge was the result of inadvertence and was not even made until after the actual claim for the debt plus interest had been set forth in litigation.

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OPINIONS BELOW

The opinions of the Supreme Court of Texas, which appear in the appendix hereto, p. 12 and 13, *infra*, are not officially reported.

The opinion of the Texas Court of Appeals, 5th Supreme Judicial District is dated March 28, 1986. It is reprinted in the appendix hereto, p. 14 *infra*.

JURISDICTION

The judgment of the Supreme Court of Texas, denying its application for writ of error, no reversible error, was entered on June 18, 1986. See p. 12, *infra*. A motion for rehearing was entertained and denied on July 16, 1986. See p. 13, *infra*.

A notice of appeal to this Court was duly filed in the Supreme Court of Texas on August 1, 1986. See p. 21, *infra*. A supplementary notice of appeal to this Court was also filed with the Texas Court of Appeals, 5th Supreme Judicial District, Dallas, Texas, on July 30, 1986, as that court was in possession of the record of this case. See p. 25, *infra*.

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. _____

TOBIN LANDSCAPE AND CONSTRUCTION COMPANY, INC.,

Appellant,

v.

JAMES BRAMLETT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

JURISDICTIONAL STATEMENT

Tobin Landscape and Construction Company, Inc., the appellant, appeals from the final judgment of the Supreme Court of Texas, denying its Motion for Rehearing, dated July 16, 1986, and sustaining its refusal of application for writ of error, no reversible error, dated June 18, 1986. Said judgment of the Supreme Court of Texas upheld the judgment of the Texas Court of Appeals, 5th Supreme Judicial District, holding that TEX. REV. CIV. STAT. ANN. article 5069 — 1.06 (Vernon Supp. 1986) is constitutional under both the Fifth and Fourteenth Amendments to the United States Constitution and Article, I, Sections 13 and 19 of the Texas Constitution. 28 U.S.C. Section 2403(b) may be applicable.

CONSTITUTIONAL PROVISIONS AND STATE LAW

FIFTH AMENDMENT, UNITED STATES CONSTITUTION:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . .

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION:

> No State shall . . . deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

TEX. REV. CIV. STAT. ANN. Article 5069 — 1.06:

> (1) Any person who contracts for, charges or receives interest, which is greater than the amount authorized by this Subtitle, shall forfeit to the obligor three times the amount of usurious interest contracted for, changed or received, such usurious interest being the amount the total interest contracted for, charged, or received exceeds the amount of interest allowed by law, and reasonable attorney fees fixed by the court except that in no event shall the amount forfeited be less than Two Thousand Dollars or twenty percent of the principal, whichever is the smaller sum; provided, that there shall be no penalty for any usurious interest which results from accidental and bona fide error.

RAISING THE FEDERAL QUESTION

At the earliest available stage of this litigation, the appellant raised the constitutional claim after having been found guilty of charging usurious interest. The claim was raised in the appellant's Brief to the Texas Court of Appeals. The Texas Court of Appeals noted appellant's contention that "article 5069 — 1.06 is unconstitutional and violative of the United States Constitution and stated "[w]e disagree and hold that article 5069 — 1.06 is within constitutional constraints." p. 17, *infra.*

The claims of unconstitutionality were reiterated by appellant before the Supreme Court of Texas in its application for writ of error. p. 27, *infra.* The Supreme Court of Texas refused the writ

of error, no reversible error and, subsequently, rejected appellant's motion for rehearing. See opinions below, p. 12 and 13, *infra*. It thus considered and rejected these federal constitutional claims.

STATEMENT OF THE CASE

This litigation was originally instituted by the appellant as a suit on sworn account brought against the appellee for materials furnished and services rendered in the amount of $6,241.75. The appellee filed a counterclaim in the trial court, alleging usury because there was a $93.00 charge on a statement within the first thirty days after the work was performed. The $93.00 charge was contained in a statement which was sent to the appellee after suit had been filed by the appellant. Judgment was entered awarding the appellee the sum of $1,248.00 representing 20% of the claimed principal debt together with attorney's fees of $1,600.00 and costs of court plus interest. Also, as a further penalty imposed by the usury statute, the appellant was denied all recovery on its claim and thus forfeited its principal debt.

The relevant facts that led to the suit and counterclaim may be summarized as follows:

(1) The appellant is engaged in the business of landscaping made a proposal to the appellee for the preparation of certain plant beds, the relocation of some shade trees and the planting of shrubs, ground cover and ornamental trees. The appellee received regular reports about the work being done and, at one point, requested additional plants to be installed on his property.

(2) When the work was completed, the appellant hand-delivered a statement to the appellee. Despite the fact that the appellee admitted that the quality of the work was up to the standard agreed upon and was worth the money charged, he refused to pay and later said he was not happy with the work.

(3) The appellant forwarded a demand letter to the appellee and, when the account remained unpaid, employed an attorney and sent a second demand letter. Ultimately, the appellant filed suit on June 9, 1985, which the appellee answered by a general denial. On August 25, 1985, subsequent to the filing and answering of the lawsuit, a secretary and billing clerk in the appellant's office prepared and mailed an invoice to the appellee. The invoice restated the charges for the work done with one exception. It also set out a fee which the clerk erroneously denominated "finance charges." The trial court later held these "finance charges" to constitute "interest" as that term is defined in the Texas usury statute in question here. The appellant was found to have charged "interest" within the first 30 days after accrual of the debt, thus making the charge usurious under the Texas statute. As a result of this inadvertent charge, the Appellant was subjected to the following penalties: (a) forfeiture of the entire account, (b) a penalty equivalent to 20% to the account which is payable to the appellee and (c) attorney's fees. In this case, the total amounts to a penalty of approximately 10,000%.

THE QUESTION IS SUBSTANTIAL

The question as to the constitutional implications of excessive penalties has been treated before in various contexts by this Court. With respect to civil and criminal penalties imposed by state usury statutes, the questions of due process and equal protection under the Fifth and Fourteenth Amendments are substantial ones that should be examined.

This Court has recognized that penal statutes, must meet constitutional due process requirements. *Helwig v. United States,* 188 U.S. 605 (1903); U.S. Const. amend. VIII. The Texas usury statute has been unequivocally declared by Texas courts to be penal in nature. Thus, Article 5069 — 1.06 must be judged by

the same standards as any penal or criminal statute as it provides for forfeiture of principle, tremendous damages and even conviction for misdemeanor.

Due process requires that a statute be clear and certain in its language. Article 5069 — 1.06 is unconstitutionally vague as it provides no clear language to put the appellant or anyone else on notice of precisely what is required of him or prohibited to him. By a reading of Article 5069 — 1.06, no reasonable person could tell that any mere charge of interest within the first 30 days after accrual of a debt would call down on his head such onerous and instant penalties. The person sought to be charged under a penal statute such as the one brought into question here must be made aware of the full consequences of a violation of the statute and that his contemplated conduct is proscribed. *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963); *Coats v. City of Cincinnati*, 402 U.S. 611 (1971).

This Court has also recognized that penalties imposed by statute can be so severe and oppressive as to be wholly disproportional to the offense and, hence, obviously unreasonable. *St. Louis Iron Mountain & Southern Ry. Co. v. Williams*, 251 U.S. 63 (1919). In this case, the Texas legislature has imposed a penalty of 10,000% on the appellant for charging interest in the first month after the appellee's debt accrued. The penalty imposed by the statute is actually the unforeseen result of a series of amendments to the original Texas usury statute and was not purposefully designed to eradicate what it here seeks to prohibit, namely, that charge of "interest" for those first fateful 30 days.

The appellant was never accused of any wrongdoing or deception in this case. It performed its work, furnished the materials needed and completed the job. For its work and materials, as a result of the application of the statute in question, the appellant received nothing. The appellee, on the other hand, now enjoys the benefit of his contract without having paid anything at all

for it. The Supreme Court of Texas, confronted with the constitutional challenge and the Court of Appeals' validation of Article 5069 — 1.06, brushed aside the appellant's challenge without comment.

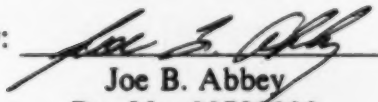
Texas has imposed on the appellant and all those who charge or receive any form of "interest" in this State, a tremendous burden and terrible, excessive penalties — penalties that extend far beyond the offense originally sought to be prohibited and which are of themselves, unconscionable. The appellant has been denied its Constitutional rights to due process and equal protection of law.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

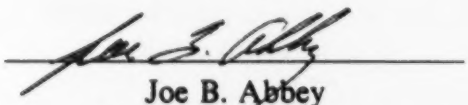
LAW OFFICES OF JOE B. ABBEY
3110 Olympia and York Tower
1999 Bryan Street
Dallas, Texas 75201
(214) 922-9245

By: 
Joe B. Abbey
Bar No. 00789000
Counsel for Appellant

October 3, 1986.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Jurisdictional Statement was placed in the United States Mail addressed to the Clerk of the United States Supreme Court of the United States, Washington, D.C. 20543 and the attorney of record, Robert C. Elder, Canterbury, Stuber, Elder & Gooch, 5550 LBJ Freeway, Suite 800, Dallas, Texas 75204 and the Attorney General for the State of Texas at P.O. Box 12548, Austin, Texas 78711 on this the 23rd day of October, 1986.



Joe B. Abbey
Counsel for Appellant

STATE OF TEXAS }
COUNTY OF DALLAS } ss.:

Before me, the undersigned authority on this day personally appeared Joe B. Abbey, who after being duly sworn, declared that he is the person who executed the foregoing instrument in the capacity therein stated and that the statements therein are true and correct.

SUBSCRIBED AND SWORN TO BEFORE ME, this 23rd day of October, 1986.

Kim Jetton

Notary Public in and for the
State of Texas

Kim Jetton

Print, Type or Stamp Name

My Commission Expires:

4-24-90

APPENDIX

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

June 18, 1986

Mr. Joe Abbey
3110 Olympia & York Tower
1999 Bryan Street
Dallas, TX 75201

Mr. David Surratt
Canterbury, Stuber, Elder & Gooch
5550 LBJ Freeway, Suite 800
Dallas, TX 75240

RE: Case No. C-5297

STYLE: TOBIN LANDSCAPE AND CONSTRUCTION CO., INC.
v. JAMES BRAMLETT

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield,
Clerk

Blanca E. Morin
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

July 16, 1986

Mr. Joe Abbey
3110 Olympia & York Tower
1999 Bryan Street
Dallas, TX 75201

Mr. David Surratt
Canterbury, Stuber, Elder & Gooch
5550 LBJ Freeway, Suite 800
Dallas, TX 75240

RE: Case No. C-5297

STYLE: TOBIN LANDSCAPE AND CONSTRUCTION CO., INC.
v. JAMES BRAMLETT

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield,
Clerk

Blanca E. Morin
Deputy

Court of Appeals
Fifth District of Texas at Dallas

No. 05-85-00612-CV

TOBIN LANDSCAPE AND CONSTRUCTION COMPANY, INC.,

Appellant,

v.

JAMES BRAMLETT,

Appellee.

JUDGMENT

This Court's judgment of February 19, 1986, is WITHDRAWN and this judgment is issued in its place.

In accordance with this Court's opinion of March 28, 1986, the judgment of the trial court is AFFIRMED. It is ORDERED that appellee James Bramlett recover his costs of this appeal from appellant Tobin Landscape and Construction Co., Inc. and Lawyers Surety Corporation, as surety on appellant's appeal bond.

March 28, 1986.

JOHN L. MCCRAW, JR.
Justice

Court of Appeals
Fifth District of Texas at Dallas

No. 05-85-00612-CV

TOBIN LANDSCAPE AND CONSTRUCTION COMPANY, INC.,

Appellant,

v.

JAMES BRAMLETT,

Appellee.

FROM A DISTRICT COURT OF DALLAS COUNTY, TEXAS

BEFORE JUSTICES STEPHENS, MCCLUNG AND MCCRAW
OPINION BY JUSTICE MCCRAW
MARCH 28, 1986

This Court's opinion of February 19, 1986 is withdrawn and this opinion is substituted as the option of this Court.

Tobin Landscape and Construction Co., Inc. sued James Bramlett on a sworn account for landscape development completed on Bramlett's property. Bramlett filed a counterclaim alleging the charging of usurious interest by Tobin. The trial court granted Bramlett a directed verdict and found that Tobin had charged usurious interest, from which judgment Tobin now appeals.

The parties failed to request findings of fact and conclusions of law or to submit a statement of facts. Therefore, this decision is rendered on the basis of the submitted transcript, pleadings and the judgment entered by the trial court, *Dorman v. Cook*, 262 S.W.2d 744, 746 (Tex. Civ. App. — Beaumont 1952, writ dism'd), and upon the undisputed facts contained in the parties'

briefs. *Finnigan v. Blanco County*, 670 S.W.2d 313, 318 (Tex. App. — Austin 1984, no writ) (on rehearing).

Under an agreed contract, Tobin performed landscaping for Bramlett's property. Tobin installed and moved numerous shrubs and then submitted an invoice to Bramlett for $6,241.75 for the work completed. Bramlett failed to pay and Tobin filed suit. Bramlett, in his answer, claimed that Tobin performed unauthorized additional work, and Bramlett disputed the invoice. Further, Bramlett stated that the work was not performed in a good and workmanlike manner.

On August 24, 1984, after the litigation had begun, Tobin sent Bramlett a second landscape invoice with three additional items designated as "Finance Charges" for June, July, and August. Bramlett then filed a counterclaim alleging that the additional charges were usurious and in violation of the "Texas Credit Code." After Tobin presented his case, Bramlett moved for a directed verdict, which was granted.

In his twelve points of error, Tobin contends that: (1-8) the provisions of TEX. REV. CIV. STAT. ANN. article 5069-1.06, (Vernon Supp. 1986), violate both the fifth and fourteenth amendments of the United States Constitution and article I, sections 13 and 19 of the Texas Constitution; (9-11) the provisions of article 5069-1.06 are contrary to public policy and fail to accomplish their given purpose; and (12) the trial court erred in finding the later issued statement usurious. For the following reasons, we overrule each point of error and affirm the judgment of the trial court.

Tobin contends in his first eight points of error that TEX. REV. CIV. STAT. ANN. article 5069-1.06 is unconstitutional and violative of the United States Constitution and the Texas Constitution. We disagree and hold that article 5069 - 1.06 is within constitutional constraints.

Article 5069 - 1.06 provides:

> (1) Any person who contracts for, charges or receives interest which is greater than the amount authorized by this Subtitle, shall forfeit to the obligor three times the amount of usurious interest contracted for, charged or received, such usurious interest being the amount the total interest contracted for, charged, or received exceeds the amount of interest allowed by law, and reasonable attorney fees fixed by the court except that in no event shall the amount forfeited be less than Two Thousand Dollars or twenty percent of the principal, whichever is the smaller sum; provided, that there shall be no penalty for any usurious interest which results from an accidental and bona fide error.

The purpose of the usury statutes is to prohibit usury under any cover or pretext whatever. *F.B. & D., Inc. v. Nathan Alterman Electric Co.*, 394 S.W. 2d 821, 823 (Tex. Civ. App. — San Antonio 1954, writ ref'd n.r.e.). While arguably the punitive results of article 5069 - 1.06 are severe, the penalties are legislatively designed to accomplish designated objectives and will not be found unconstitutionally excessive except in extraordinary cases where the fine is such that it "shocks the sense of mankind." *State v. Laredo Co.*, 96 Tex. 461, 467, 73 S.W. 951, 953 (1903). We hold that the penalty rendered herein is not of an unconstitutional magnitude, thereby carrying out the intended legislative purpose, of deterring the charge of usurious interest.

Further, with respect to constitutional due process, the states may exercise great discretion in assessing fines; their actions are only limited when the penalty assessed is so disproportional to the offense as to be unreasonable. *Pennington v. State*, 606 S.W.2d 682, 690 (Tex. 1980). The legislature's treatment of usury makes it clear that the charging of excessive interest is a very serious matter and that the consumer will be protected from vendors who choose to engage in this abusive and deceptive practice. Thus, a stringent penalty, as was applied in this case, is reasonable and bears a rational relationship to the seriousness of Tobin's act.

Tobin was penalized 20% of the principal, plus reasonable and necessary attorney's fees. This amount is well within the statutory guidelines and thus not disproportional to prescribed penalties established by the legislature. Therefore, the usury statute is not violative of Tobin's constitutional rights. Points of error one through eight are overruled.

In points of error nine through eleven, Tobin contends that article 5069 - 1.06 is contrary to public policy and fails to accomplish the purposes for which it was established. We disagree.

The penal provisions of article 5069 - 1.06 demand that the "charges" made be statutorily permissive. Consumers can thereby rely upon the protection offered by the statute when confronted by the usurious acts of vendors. The usury provisions are not designed to compensate consumers for actual damages. Instead they were designed to deter violators and to encourage enforcement of the statutes by private litigants, thereby placing the cost of violation on the perpetrators. *Anguiano v. Jim Walter Homes, Inc.*, 561 S.W.2d 249, 254 (Tex. Civ. App. — San Antonio 1978, writ ref'd n.r.e.). Clearly, such a policy does not harm the formation of good faith contracts but instead promotes valid business dealings through party awareness and acceptance of required responsibilities. Points of error nine through eleven are overruled.

Finally, in point of error twelve, Tobin asserts that the trial court erred in finding that the second invoice contained a usurious charge and was not merely a miscalculation of interest. Although we recognize that the defenses of accidental and bona fide error provide exceptions to the penalties under the usury statute, article 5069 - 1.06, *Tyra v. Carroll Construction Company*, 639 S.W.2d 690, 691 (Tex. 1982), the lack of a statement of facts makes a review of the evidence regarding these defenses impossible. In a situation where a statement of facts is not submitted, it is presumed that there is sufficient evidence to support the judgment of the trial court. *Cowling v. Colligan*, 112 S.W.2d 943, 946 (Tex. 1958); *Simon v. Watson*, 525 S.W.2d

210, 213 (Tex. Civ. App. — Dallas 1975, writ dism'd). Appellant's twelfth point of error must, therefore, be overruled and the judgment of the trial court affirmed.

John L. McCraw, Jr.
Justice

PUBLISH

Court of Appeals
Fifth District of Texas at Dallas
Dallas County Courthouse
Dallas, Texas 75202-1658

MARCH 28, 1986

CHIEF JUSTICE
CLARENCE A. GUITTARD
JUSTICES

TED M. AKIN	CHARLES BEN HOWELL
BILL J. STEPHENS	PAT MCCLUNG
JOHN C. VANCE	JOHN L. MCCRAW, JR.
WARREN WHITHAM	ROLLAND T. SCALES
PATRICK C. GUILLOT	ANNETTE STEWART
JOSEPH A. DEVANY	CYNTHIA HOLLINGSWORTH

ROBERT C. ELDER, JR.
DAVID SURRATT
CANTERBURY, STUBER, ELDER & GOOCH
5550 LBJ Freeway, Suite 800, Dallas, Texas 75240
JOE B. ABBEY
LAW OFFICES OF JOE B. ABBEY
3110 Olympia and York Tower
1999 Bryan Street, Dallas, Texas 75201

Re: 05-85-00612-CV, TOBIN LANDSCAPE AND CONSTRUCTION CO., INC. v. JAMES BRAMLETT.

Counsel:

Please be advised that the Court has decided to publish the opinion in the above cause handed down on February 19, 1986.

Kenneth P. Stripling, *Clerk*
(214) 749-0302

Judy Gross, *Deputy*

jg
Enclosure
cc: Judge John McClellan Marshall 14th Judicial District Court

IN THE

Supreme Court of the State of Texas

No. C 5297
(Court of Appeals)
No. 05-85-00612-CV

TOBIN LANDSCAPING CONSTRUCTION COMPANY, INC.,

Appellant,

v.

JAMES BRAMLETT,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Tobin Landscaping Construction Company, Inc., the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Texas, overruling Appellant's Motion for Rehearing of its refusal of the Application for Writ of Error in this action on July 16, 1986.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Respectfully submitted,

LAW OFFICES OF JOE B. ABBEY
3110 Olympia and York Tower
1999 Bryan Street
Dallas, Texas 75201
(214) 992-9245

JOE B. ABBEY
Bar No. 00789000

IN THE

Supreme Court of the State of Texas

No. C 5297
(Court of Appeals)
No. 05-85-00612-CV

TOBIN LANDSCAPING CONSTRUCTION COMPANY, INC.,

Appellant,

v.

JAMES BRAMLETT,

Appellee.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Notice of Appeal to the Supreme Court of the United States was placed in the United States Mail addressed to attorney of record, Robert C. Elder, Jr. Canterbury, Stuber, Elder & Gooch, 5550 LBJ Freeway, Suite 800, Dallas, Texas 75240, on this the 29th day of July, 1986.

JOE B. ABBEY

IN THE

Supreme Court of the State of Texas

No. C 5297
(Court of Appeals)
No. 05-85-00612-CV

TOBIN LANDSCAPING CONSTRUCTION COMPANY, INC.,

Appellant,

v.

JAMES BRAMLETT,

Appellee.

VERIFICATION OF SERVICE

STATE OF TEXAS }
COUNTY OF DALLAS } ss.:

I hereby swear and certify that I have served a copy of Appellant's Notice of Appeal to the Supreme Court of the United States on Robert C. Elder, Jr., Canterbury, Stuber Elder & Gooch, 5550 LBJ Freeway, Suite 800, Dallas, Texas 75240, Counsel for Appellee, by depositing a copy of the same in a mail box with first class postage prepaid on the 29th day of July, 1986. I further swear and certify that all parties required to be served have been served.

JOE B. ABBEY

Before me, the undersigned Notary Public, on this day personally appeared Joe B. Abbey, who being by me duly sworn on his oath deposed and said that he is the attorney for Appellant in the above-entitled and numbered cause; that he has read the

Verification of Service and that every statement contained therein is within his personal knowledge and are true and correct.

JOE B. ABBEY

SUBSCRIBED AND SWORN TO BEFORE ME, on the 5th day of August, 1986, to certify which witness my hand and official seal.

Kim Jetton
Notary Public in and for
Dallas County, Texas
My Commission Expires: 4-24-90

Mary M. Wakefield,
Clerk

IN THE

Supreme Court of the State of Texas

No. C 5297
(Court of Appeals)
No. 05-85-00612-CV

TOBIN LANDSCAPING CONSTRUCTION COMPANY, INC.,

Appellant,

v.

JAMES BRAMLETT,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Tobin Landscaping Construction Company, Inc., the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Texas, overruling Appellant's Motion for Rehearing of its refusal of the Application for Writ of Error in this action on July 16, 1986.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Respectfully submitted,

LAW OFFICES OF JOE B. ABBEY
3110 Olympia and York Tower
1999 Bryan Street
Dallas, Texas 75201
(214) 992-9245

JOE B. ABBEY
Bar No. 00789000

Kenneth P. Stripling,
Clerk, 5th District

IN THE

Supreme Court of the State of Texas

No. C 5297
(Court of Appeals)
No. 05-85-00612-CV

TOBIN LANDSCAPING CONSTRUCTION COMPANY, INC.,

Appellant,

v.

JAMES BRAMLETT,

Appellee.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Notice of Appeal to the Supreme Court of the United States was placed in the United States Mail addressed to attorney of record, Robert C. Elder, Jr. Canterbury, Stuber, Elder & Gooch, 5550 LBJ Freeway, Suite 800, Dallas, Texas 75240, on this the 29th day of July, 1986.

JOE B. ABBEY

IN THE

Supreme Court of Texas

No. _____

TOBIN LANDSCAPE AND CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

JAMES BRAMLETT,

Respondent.

PETITIONER'S APPLICATION FOR WRIT OF ERROR

LAW OFFICES OF JOE B. ABBEY
3110 Olympia and York Tower
1999 Bryan Street
Dallas, Texas 75201
(214) 922-9245

By: Joe B. Abbey
Bar No. 00789000
Attorney for Petitioner

SUBJECT INDEX

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POINT OF ORDER ONE RESTATED:
THE JUDGMENT OF THE COURT OF APPEALS IS INCORRECT BECAUSE THE DAMAGE PROVISIONS OF ARTICLE 5069-1.06 V.A.T.S. CANNOT BE CONSTITUTIONALLY APPLIED.

POINT OF ERROR TWO RESTATED:
THE PENAL AND CRIMINAL PROVISIONS OF ARTICLE 5069-1.06 VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 13 AND 19 OF THE TEXAS CONSTITUTION.

POINT OF ERROR THREE RESTATED:
THE PENAL AND CRIMINAL PROVISIONS OF ARTICLE 5069-1.06 DO NOT GIVE FAIR NOTICE OF THE PROHIBITED CONDUCT IN ORDER TO COME WITHIN CONSTITUTIONAL DUE PROCESS LIMITATIONS.

POINT OF ERROR FOUR RESTATED:
THE PENAL AND CRIMINAL PROVISIONS OF ARTICLE 5069-1.06 DO NOT CONVEY SUFFICIENTLY DEFINITE WARNINGS AS TO THE PROSCRIBED CONDUCT WHEN MEASURED BY COMMON UNDERSTANDING AND PRACTICES.

PAGE

POINT OF ERROR FIVE RESTATED:
THE PENAL PROVISIONS OF ARITCLE 5069-1.06 ARE SO EXCESSIVE AND VIOLATIVE OF THE CONSTITUTIONAL RESTRAINTS OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE PROVISIONS OF THE TEXAS CONSTITUTION AS TO SHOCK THE SENSE OF MANKIND.

POINT OF ERROR SIX RESTATED:
THE PENAL PROVISIONS OF ARTICLE 5069-1.06 ARE SO SEVERE AND OPPRESSIVE AS TO BE WHOLLY DISPROPORTIONATE TO THE OFFENSE AND ARE OBVIOUSLY UNREASONABLE.

POINT OF ERROR SEVEN RESTATED:
THE PENAL PROVISIONS OF ARTICLE 5069-1.06 ARE NOT FIXED WITH REFERENCE TO THE ABUSE OF A FINANCE CHARGE WITHIN 30 DAYS AFTER THE DEBT ACCRUES ON A WRITTEN CONTRACT.

POINT OF ERROR EIGHT RESTATED:
THE PENAL PROVISIONS OF ARTICLE 5069-1.06 WERE NOT DESIGNED FOR THE PURPOSE OF DETERRING THE GENERAL PUBLIC FROM CHARGING ANY INTEREST WITHIN 30 DAYS AFTER THE DEBT ACCRUES ON A WRITTEN CONTRACT.

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POINT OF ERROR NINE RESTATED:
THE PENAL PROVISIONS OF ARTICLE 5069-1.06 ARE CONTRARY TO PUBLIC POLICY AS THEY ENCOURAGE DEFALCATION ON CONTRACTS AND DESTROY THE SANCTITY OF CONTRACT.

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POINT OF ERROR TEN RESTATED:
THE PENAL PROVISIONS OF ARTICLE 5069-1.06 PERFORM A DISSERVICE TO THE PUBLIC AS A WHOLE BY ENCOURAGING AVOIDANCE OF CONTRACT.

POINT OF ERROR ELEVEN RESTATED:
THE PURPOSES OF THE INTEREST-CONSUMER CREDIT-CONSUMER PROTECTION ACT (ARTICLE 5069-1.06 V.A.T.S.) ARE NOT FURTHERED BY THE LEVY OF EXCESSIVE PENALTIES ON CONTRACTORS WHO ARE NEITHER UNSCRUPULOUS NOR ENGAGED IN ABUSIVE AND DECEPTIVE PRACTICES.

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POINT OF ERROR TWELVE RESTATED:
THE JUDGMENT OF THE COURT OF APPEALS WAS INCORRECT IN FINDING THAT THE STATEMENT ISSUED BY PETITIONER AFTER THE SUIT WAS FILED CONTAINED A USURIOUS CHARGE OF "INTEREST" AS THE CLAIM FOR INTEREST SHOULD HAVE BEEN CONTROLLED BY THE PLAINTIFF'S PETITION AS A MATTER OF LAW.

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LIST OF NAMES OF PARTIES

The following is a complete list of all parties to this action:

	NAME
Plaintiff	Tobin Landscape & Construction Company, Inc.
Defendant	James Bramlett

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IN THE

Supreme Court of Texas

No. ____

TOBIN LANDSCAPE AND CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

JAMES BRAMLETT,
Respondent.

PETITIONER'S APPLICATION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner, Tobin Landscape & Construction Company, Inc. ("Tobin"), Appellant in Cause No. 05-85-00612-CV in the Court of Appeals for the Fifth Supreme Judicial District of Texas, at Dallas, Texas, and Plaintiff in the district court, respectfully submits this Application for Writ of Error to correct errors of law committed by the Court of Appeals in affirming judgment in favor of Respondent, James Bramlett ("Bramlett"), Appellee below and Defendant in the district court.

STATEMENT OF THE NATURE OF THE CASE

This is a suit on sworn account brought by Tobin against Bramlett for materials furnished and services rendered in the amount of $6,241.75. Appellee filed a counterclaim alleging usury because there was a $93.00 charge on a statement within the first thirty days after the work was performed, a statement which was sent to Bramlett after this suit was filed. Judgment was entered awarding Bramlett the sum of $1,248.00 representing 20% of the claimed principal debt together with attorney's fees of $1,600.00 and costs of court plus interest. In addition, Tobin was denied all recovery on its claim.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this suit under Article 5, Section 3 of the Texas Constitution and Title 2, Section 22.001 of the Texas Government Code.

POINTS OF ERROR

POINT ONE

THE JUDGMENT OF THE COURT OF APPEALS IS INCORRECT BECAUSE THE DAMAGE PROVISIONS OF ARTICLE 5069-1.06 V.A.T.S. CANNOT BE CONSTITUTIONALLY APPLIED.

POINT TWO

THE PENAL AND CRIMINAL PROVISIONS OF ARTICLE 5069-1.06 VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 13 AND 19 OF THE TEXAS CONSTITUTION.

POINT THREE

THE PENAL AND CRIMINAL PROVISIONS OF ARTICLE 5069-1.06 DO NOT GIVE FAIR NOTICE OF THE PROHIBITED CONDUCT IN ORDER TO COME WITHIN CONSTITUTIONAL DUE PROCESS LIMITATIONS.

POINT FOUR

THE PENAL AND CRIMINAL PROVISIONS OF ARTICLE 5069-1.06 DO NOT CONVEY SUFFICIENTLY DEFINITE WARNINGS AS TO THE PROSCRIBED CONDUCT WHEN MEASURED BY COMMON UNDERSTANDING AND PRACTICES.

POINT FIVE

THE PENAL PROVISIONS OF ARTICLE 5069-1.06 ARE SO EXCESSIVE AND VIOLATIVE OF THE CONSTITUTIONAL RESTRAINTS OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE PROVISIONS OF THE TEXAS CONSTITUTION AS TO SHOCK THE SENSE OF MANKIND.

POINT SIX

THE PENAL PROVISIONS OF ARTICLE 5069-1.06 ARE SO SEVERE AND OPPRESSIVE AS TO BE WHOLLY DISPROPORTIONATE TO THE OFFENSE AND ARE OBVIOUSLY UNREASONABLE.

POINT SEVEN

THE PENAL PROVISIONS OF ARTICLE 5069-1.06 ARE NOT FIXED WITH REFERENCE TO THE ABUSE OF A FINANCE CHARGE WITHIN 30 DAYS AFTER THE DEBT ACCRUES ON A WRITTEN CONTRACT.

POINT EIGHT

THE PENAL PROVISIONS OF ARTICLE 5069-1.06 WERE NOT DESIGNED FOR THE PURPOSE OF DETERRING THE GENERAL PUBLIC FROM CHARGING ANY INTEREST WITHIN 30 DAYS AFTER THE DEBT ACCRUES ON A WRITTEN CONTRACT.

POINT NINE

THE PENAL PROVISIONS OF ARTICLE 5069-1.06 ARE CONTRARY TO PUBLIC POLICY AS THEY ENCOURAGE DEFALCATION ON CONTRACTS AND DESTROY THE SANCTITY OF CONTRACT.

POINT TEN

THE PENAL PROVISIONS OF ARTICLE 5069-1.06 PERFORM A DISSERVICE TO THE PUBLIC AS A WHOLE BY ENCOURAGING AVOIDANCE OF CONTRACT.

POINT ELEVEN

THE PURPOSES OF THE INTEREST-CONSUMER CREDIT-CONSUMER PROTECTION ACT (ARTICLE 5069-1.06 V.A.T.S.) ARE NOT FURTHERED BY THE LEVY OF EXCESSIVE PENALTIES ON CONTRACTORS WHO ARE NEITHER UNSCRUPULOUS NOR ENGAGED IN ABUSIVE AND DECEPTIVE PRACTICES.

POINT TWELVE

THE JUDGMENT OF THE COURT OF APPEALS WAS INCORRECT IN FINDING THAT THE STATEMENT ISSUED BY PETITIONER AFTER THE SUIT WAS FILED CONTAINED A USURIOUS CHARGE OF "INTEREST" AS THE CLAIM FOR INTEREST SHOULD HAVE BEEN CONTROLLED BY THE PLAINTIFF'S PETITION AS A MATTER OF LAW.

FACT STATEMENT

Petitioner Tobin made a proposal to Respondent Bramlett for preparing beds, relocating shade trees and planting shrubs, ground cover and ornamental trees (S.F. p. 4; Ex. 1). The work was done and daily reports were prepared on April 14, April 26, and May 3 (S.F. p. 6; Ex. 2, 3 and 4). Bramlett requested additional plants (S.F. p. 7, 8). Tobin hand delivered a statement to Bramlett's office (S.F. p. 9; Ex. 5). Bramlett had a reputation for not paying his bills (S.F. p. 9, 10 and 16). The quality of the work was up to the standard agreed upon and was worth $6,241.75 or more (S.F. p. 11, 12, 17, 18, 19, 25, and 26). Petitioner Tobin forwarded a demand letter to Bramlett on May 10, 1984, when the account remained unpaid (S.F. p. 21 and 22: Ex.

7). Bramlett responded on May 16 that he was unhappy with the job (S.F. p. 21, Ex. 8). Tobin employed an attorney and a demand letter was sent to Bramlett on May 24 (S.F. 23; Ex. 10). Tobin filed suit on June 9 (Tr. p. 3-8). Bramlett filed a General Denial on July 24 (Tr. p. 8). Tobin mailed an invoice on August 25, after suit was filed and answered, which purported to include "finance charges" (S.F. p. 23; Ex. 9). The statement was prepared and mailed by a secretary and billing clerk of Petitioner Tobin (Tr. p. 27; S.F. p. 28-32).

BRIEF OF THE ARGUMENT

POINTS OF ERROR ONE THROUGH EIGHT RESTATED

POINT ONE

THE JUDGMENT OF THE COURT OF APPEALS IS INCORRECT BECAUSE THE DAMAGE PROVISIONS OF ARTICLE 5069-1.06 V.A.T.S. CANNOT BE CONSTITUTIONALLY APPLIED.

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WHEN MEASURED BY COMMON UNDERSTANDING AND PRACTICES.

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ARGUMENT AND AUTHORITIES
UNDER POINTS ONE THROUGH EIGHT

The Texas Constitution, Article 16, Section 11 provides in pertinent part:

> The Legislature shall have authority to classify loans and lenders, license and regulate lenders, define interest and fix maximum rates of interests . . .; provided further, that in contracts where no rate of interest is agreed upon, the rate shall not exceed six percent (6%) per annum. . .

The United States Constitution, in the Fifth and Fourteenth Amendments, prohibits deprivation of life, liberty or *property* without due process of law. This guarantee of fundamental liberties and due process is confirmed by the Texas Constitution, Article 1, Section 13 and 19. When viewed against these prohibitions, the penalty provisions of Article 5069 - 1.06 V.A.T.S. cannot be constitutionally applied.

This Court has stated that any charge of interest within 30 days after an account or contract is due and payable violates the penal provisions of the usury statutes, prompting the following penalties: (1) forfeiture of the entire account, (2) a penalty equivalent to 20% of the account payable to Appellee and (3) attorney's fees. In this case, the total amounts to a penalty of approximately 10,000%. Certainly, a person of ordinary intelligence would consider excessive and unreasonable a 10,000% penalty for a inadvertant charge included in a statement that was not prepared or mailed until well after this lawsuit was filed and answered. Here, there was no actual loss to Bramlett because none of the charged interest was pled for in Plaintiff's Petition. While there is a logical economic reason for a delay in charging interest on an open account, no economic or social hardship is caused by charging interest on a contract from the day it is due and payable.

Petitioner Tobin urges that Article 5069 - 1.06 must be judged by the same standards as any penal or criminal statute as it provides for forfeiture of principle, treble damages and conviction for misdemeanor. Due process requirements must be met by this statute. *See, Wayne County v. Steel,* 121 Neb. 438, 237 N.W. 288 (1931); *Zuest v. Ingra,* 134 N.J.L. 15, 45 A. 2d 810 (1946); *Cleveland C.C. St. L. Railway Company v. Wells,* 65 Ohio St. 313, 62 N.E. 332 (1901); *Blake v. Grant,* 65 Wash. 2d

410, 397 P. 2d 843 (1964); *Gardner v. Lovegren*, 27 Wash. 356, 67 P. 615 (1902); *Helwig v. United States*, 188 U.S. 605, 23 S.Ct 427, 47 L. Ed. 614 (1903).

Due process requires certainty. Article 5069 - 1.06 is unconstitutionally vague as it provides no clear language to put Petitioner on notice of precisely what is required of him or prohibited to him. *A.B. Small and Company v. American Sugar Refining Co.*, 267 U.S. 233 (1925); *Lone Star Gas Co. v. Kelly*, 140 Tex. 15, 165 S.W. 2d 446 (1942); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952). The person sought to be charged under a penal statute such as the usury statute must be made aware of the full consequences of violation of the act and that his contemplated conduct is proscribed. Article 5069 - 1.06 V.A.T.S. does not do this. *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963); *Coats v. City of Cincinnati*, 402 U.S. 611 (1971); *Giaccio v. State of Pennsylvania*, 382 U.S. 399 (1966); *Lanzetta v. State of New Jersey*, 306 U.S. 451 (1939).

Not only is the statute unconstitutionally vague, the penalty imposed upon Petitioner Tobin by the statute is clearly excessive. Courts in this state have upheld usury penalties that did not constitute an excessive fine in violation of Texas Constitution, Article 1, Section 13. *Anguiano v. Jim Walter Homes, Inc.*, 561 S.W. 2d 249 (Tex Civ. App. — San Antonio, 1978), writ ref. n.r.e. (holding that a fine of twice the finance charge and reasonable attorneys fees was not excessive); *State v. Laredo Ice Co.*, 96 Tex. 461, 73 S.W. 951 (1903) (where the Court allowed for legislative discretion only when the penalty was not so excessive as to "shock the sense of mankind").

If a penalty of 10,000% as was applied here against Petitioner Tobin is not excessive, there is surely no set of facts that would constitute an excessive penalty. Clearly, the drafters of the U.S. and Texas Constitutions did not intend the present result. A 10,000% penalty is so grossly unreasonable as to be shocking. Petitioner asks this Court to consider the actual offense complained of here by Bramlett. After suit had been filed, Petitioner

issued a statement showing a "finance charge" for the first 30 days after the debt accrued. The abuse sought to be deterred is a one month finance charge. The legislature has abused its discretion in imposing a fine of 10,000% where, as here, that penalty is so severe and oppressive as to be wholly disproportional to the offense and obviously unreasonable. *St. Louis Iron Mountain & Southern Ry. Co. v. Williams,* 251 U.S. 63 (1919). In this case, the penalty is the unforeseen result of a series of amendments to the original usury statute and was not designed to eradicate what it here seeks to prohibit, namely, the charging of "interest" for the first 30 days after a contract sum becomes due and payable. The statute states that the penalty is to be imposed for charges of "interest" over twice the allowable rate, with no specific reference to the penalty being imposed for a one month finance charge.

POINTS OF ERROR NINE THROUGH ELEVEN RESTATED

POINT NINE

THE PENAL PROVISIONS OF ARTICLE 5069 - 1.06 ARE CONTRARY TO PUBLIC POLICY AS THEY ENCOURGAGE DEFALCATION ON CONTRACTS AND DESTROY THE SANCTITY OF CONTRACT.

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WHO ARE NEITHER UNSCRUPULOUS NOR ENGAGED IN ABUSIVE AND DECEPTIVE PRACTICES.

ARGUMENT AND AUTHORITIES UNDER POINTS NINE THROUGH ELEVEN

The declaration of legislative intent in the Interest-Consumer Credit-Consumer Protection Act (Article 5069 - 1.06 V.A.T.S) states that unscrupulous operators, lenders and vendors are presently engaged in many abusive and deceptive practices in the conduct of their business causing great social and economic hardship to the citizens of Texas. Thus, it was the clear intent of the Texas Legislature to protect the citizens of Texas from these abuses and deceptions.

Nothing in the record of this case implies that Petitioner Tobin is in any way unscrupulous or that its actions were deceptive. Petitioner performed work, furnished materials and simply sought to be paid. Yet, the usury statute, as it is written, encouraged Respondent Bramlett to violate his contract with Petitioner and defalcate on his obligations after Petitioner fully performed. Respondent now enjoys the benefits of his contract without any payment being made by him for the services and materials he received. Petitioner, who inadvertently charged interest during the first 30 days after the debt accrued, is placed in the position of being considered unscrupulous while Respondent is allowed to "walk" the contract and receive an additional monetary benefit on top of that.

A broader public is served by preserving the sanctity of contract. The penal provisions of Article 5069 - 1.06 were provided for extra damage recovery so that consumers would have an incentive for pursuing their claims, but, instead have become so excessive as to not be in furtherance of the statute's purpose at all. In fact, the statute's provisions encourage dishonesty and avoidance of contract.

POINT OF ERROR TWELVE RESTATED

POINT TWELVE

THE JUDGMENT OF THE COURT OF APPEALS WAS INCORRECT IN FINDING THAT THE STATEMENT ISSUED BY PETITIONER AFTER THE SUIT WAS FILED CONTAINED A USURIOUS CHARGE OF "INTEREST" AS THE CLAIM FOR INTEREST SHOULD HAVE BEEN CONTROLLED BY THE PLAINTIFF'S PETITION AS A MATTER OF LAW.

ARGUMENT AND AUTHORITIES UNDER POINT TWELVE

Plaintiff's Petition, filed on June 9, 1984, prayed for recovery of the account in the amount of $6,241.75 plus statutory prejudgment interest in said amount at the rate of 6% and postjudgment interest at the rate of 9% (Tr. 3 and 4). After the suit was filed, a statement was issued by a billing clerk on August 25, 1984, which contained the purported usurious charge (Tr. 27; S.F. p. 28-32).

Petitioner urges that the pleadings control the amount of interest charged by Petitioner as a matter of law. The statement issued after suit was filed here contained an inadvertent mistake and miscalculation of interest. For that reason alone, Petitioner should not have been found liable for usury. Petitioner urges further that, even had there been no miscalculation of interest, the pleadings as a matter of law should control the issue of the interest being sought, not an unverified statement issued after suit has already been filed.

It should be obvious that the amount of interest Petitioner sought to charge was the amount alleged in its Plaintiff's Petition, not what was stated in an extraneous, unverified statement not even prepared until well-after suit was instituted and answered. Had Petitioner intended to charge the usurious interest alleged to have been sought here, it is only logical that the claim for interest would have been included in the Petition itself.

No such usurious charge is to be found in Plaintiff's Petition. As a matter of law, the subsequent "charge", which Petitioner never actually attempted to collect at any time, should be disregarded for the purpose of determining whether or not usury has been charged where, as here, said charge of interest was made after suit was filed. At some point, the interest claimed by Petitioner became certain. Petitioner Tobin urges that that time was when suit was filed.

PRAYER FOR RELIEF

For the reasons stated, Petitioner respectfully submits that this Application for Writ of Error should be granted, and that the Supreme Court should reverse the judgment of the Court of Appeals for the Fifth Supreme Judicial District of Texas, Dallas, Texas, and reverse the judgment of the 14th District Court of Dallas County, Texas, rendering judgment for Petitioner in the amount sought in Plaintiff's Original Petition and denying all relief sought by Respondent, or, in the alternative, remanding this cause for further proceedings consistent with the ruling of this Court, or, in the alternative, granting Petitioner a new trial.

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Application for Writ of Error was placed in the United States Mail addressed to attorney of record, Robert C. Elder, Jr., Canterbury, Stuber, Elder & Gooch, 5550 LBJ Freeway, Suite 800, Dallas, Texas 7524 on this the 23rd day of April, 1986.

Joe B. Abbey
Attorney for Petitioner